

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 2, 2006

Statement on Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
On Nomination of Paul McNulty
To Be Deputy Attorney General
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The Committee today will consider the nomination of Paul McNulty to the position of Deputy Attorney General. The Deputy Attorney General is the number two position at the Department of Justice, and in the absence of the Attorney General, the Deputy acts as the Attorney General.

The previous Deputies, including James Comey and his predecessor Larry Thompson, have had extensive experience as prosecutors. When the President nominated Tim Flanigan to this position, I and other senators raised questions about his lack of prosecutorial experience. It was of particular concern given that none of the top officials at the Department had experience prosecuting criminal cases. I noted that neither the current Attorney General, nor the Associate Attorney General, nor the Assistant Attorney General chosen to head the Criminal Division, nor even the Solicitor General brought that vital experience to the Department.

The President eventually withdrew Mr. Flanigan's nomination. Questions still remain about the circumstances of that nomination. I joined Senator Durbin in a letter just yesterday to the Attorney General about the role that Mr. Flanigan's dealings with Jack Abramoff and David Safavian played in that action. I look forward to thoroughly responsive answers to that letter.

With respect to prosecutorial experience, Mr. McNulty comes to us as the Acting Deputy Attorney General and U.S. Attorney for the Eastern District of Virginia, so he has had some supervisory experience with criminal matters. Being a U.S. Attorney is not like being a district attorney or local prosecutor, however, and I am not sure how many cases Mr. McNulty has personally prosecuted. As the Deputy Attorney General, prosecutorial experience and prosecutorial judgment will be sorely needed and tested in this Justice Department. He is overseeing delicate investigative and prosecutorial decisions. Situations will arise where prosecutorial experience will be beneficial and may be critical, especially given the lack of other experience in the top ranks of the Department.

This points to the bigger issue. We are faced with a President who holds an extreme and expansive view of his power. Within the Executive branch, the Department of Justice serves as an important check on Presidential power, corruption and illegality. The Justice Department must make independent decisions about sensitive criminal prosecutions and must often tell the rest of the Federal Government, including the White House, what it may and may not legally do.

The most recent Deputy Attorney General, James Comey, a respected prosecutor and a long-time Republican, seemed to many of us to have taken this responsibility seriously. He appointed a committed, independent prosecutor to investigate potentially serious wrongdoing within the Bush Administration. According to recent press reports, Mr. Comey questioned the President's authority to conduct warrantless wiretapping and defended career attorneys who sought to put the brakes on over-expansive assertions of Executive power. It seemed to many of us and now appears from recent press accounts, that for his trouble, for refusing to be a "yes man," Mr. Comey was apparently drummed out of the Department of Justice. The Department of Justice should not be made up of "yes men." It needs

to enforce the law and make sure that the law, including the laws that Congress enacts to protect the liberties and rights of ordinary Americans, are faithfully executed.

I voted against confirmation of the current Attorney General because I did not believe that he would act independently of the White House and serve the proper role of the Attorney General of the United States. Attorney General Gonzales has been a loyal friend and representative of the President and, regrettably in my view, he has continued to act like the President's in-house counsel. During the debate of his nomination one year ago, I noted the importance of having an Attorney General who would act as a check against presidential overreaching:

"Ultimately, the Attorney General's duty is to uphold the Constitution and the rule of law--not labor to circumvent it. Both the President and the nation are best served by an Attorney General who gives sound legal advice and takes responsible action, without regard to political considerations--not who develops legalistic loopholes to serve the ends of a particular President or Administration."

Those words hold just as true for the important position of Deputy Attorney General. At the time, I did not know how right I would turn out to be. The recent revelation that the Bush Administration has been conducting illegal spying on Americans for more than four years, while Mr. Gonzales served as White House Counsel and Attorney General, is the most serious of a series of wrongheaded legal rationalizations for illegal conduct that include the scandal of Abu Ghraib and the withdrawn torture memo, the extraordinary rendition and black site prisons in the former Soviet Union, and the Supreme Court having to reign in this President and remind him that even war time "is not a blank check for the President when it comes to the rights of the Nation's citizens."

Mr. McNulty has had a number of important Republican political jobs. I first met him when he was serving as staff for Republicans on the House Judiciary Committee. He is someone I like personally. Whether he will be able to follow Mr. Comey's example of independence and the examples of other Republicans like Elliot Richardson and William French Smith, who resigned or were fired rather than interfere with the investigation of wrongdoing of the Nixon Administration, is a critical question.

The Eastern District of Virginia, under Mr. McNulty, has been the "go-to" district for the Bush Administration for terrorism prosecutions, national security issues, and detainee abuse allegations. His work on these issues needs to be explored and explained. We need to understand how much he will be willing to question extreme assertions of Presidential power and to look out for the individual liberties of ordinary Americans and protect the rule of law.

According to a recent letter from the Department of Justice to Senator Durbin, since the beginning of the war on Afghanistan in 2001, 20 allegations of detainee abuse by American civilians have been referred to the Department of Justice, and all but one of these cases, have been assigned to a task force in the U.S. Attorney's Office for the Eastern District of Virginia, under Mr. McNulty's supervision. To date, only one of these allegations - the one that was not referred to his office - has resulted in an indictment.

These are instances of serious misconduct that have hurt American credibility in the world, potentially increased the risk to our troops abroad and undermined our ability to combat the threat of terrorism. Press reports say that these referrals include one case in which a detainee was killed in CIA custody within 45 minutes of the beginning of the interrogation and in that case the CIA's own Inspector General found the "possibility of criminality." It has been 18 months since former Attorney General Ashcroft announced the creation of the taskforce in Mr. McNulty's office to investigate these cases. We need to understand why, when the military has prosecuted detainee abuse cases and the Eastern District of North Carolina has returned the one civilian indictment thus far handed down for this type of conduct, Mr. McNulty's task force has not yet acted.

Finally, it will be important to find out what he knew and when about the President's warrantless domestic spying program and what he has done to make sure that the Government is not violating the law. We need to get to the bottom of this and understand how Mr. McNulty responded to these important issues.

I support aggressive action to protect against terrorism. I helped write and pass the USA PATRIOT Act. I am working hard to pass its reauthorization. But it is also important that the Department do its utmost to protect individual liberties and to make sure that the Government acts legally. I hope that Mr. McNulty can reassure us on these matters.

I welcome Mr. McNulty to the Committee today, and I hope that he will provide the Members of this Committee with candid responses and the information this Committee needs to conduct necessary oversight.

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